FILE COPY

Supreme Court, U. S.
AUG 18 1950

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 255

GEORGE WARD,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

EARL BOYD PIERCE,
Counsel for Petitioner.

INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Nature of the case	2
Statutory basis of jurisdiction	3
Questions involved	4
Exhibit "A"—Opinion of the United States Court of Appeals for the Tenth Circuit	7

Table of Cases Cited

Hewitt v. *United States*, 110 Fed. (2d) 1	4

Statutes Cited

Bank Robbery Act of 1934 (48 Stat. 783, 50 Stat. 759, then Title 12 U. S. C., Sec. 588b and 588c, now Title 18, Sec. 2113 Revised)	1, 2
Constitution of the United States, Fifth Amendment	3
Federal Rules of Criminal Procedure, Rule 37(b)	3
Rules of the Supreme Court of the United States, Rule 38, Para. 5(b)	3
United States Code, Title 28, Sec. 1254	3

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 255

GEORGE WARD,

Petitioner,

vs.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the United States:

Petitioner, George Ward, respectfully prays this Honorable Court that the writ of certiorari be granted to review the proceedings and final decision of the United States Court of Appeals for the 10th Circuit, in a certain case decided by said Court on June 21, 1950, styled George Ward, Plaintiff in Error vs. United States of America, Defendant in Error, No. 4056, Criminal, wherein your petitioner was plaintiff in error and the respondent was defendant in error, and respecting such proceedings and final decision your petitioner respectfully represents and shows:

I

(1) That on February 4th, 1937, petitioner, George Ward, after conviction by a jury, was sentenced on three counts under the Bank Robbery Act of 1934 (48 Stat., 783, 50 Stat., 759, then Title 12 U.S.C., Sec., 588b, and 588c, now

Title 18, Sec., 2113 Revised) which, in 1937, read in part as follows:

12 U.S.C. 588b (a),

"Whoever, by force and violence, or putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money, or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank shall be fined not more than $5,000.00 or imprisoned not more than twenty (20) years, or both."

12 U.S.C., 588b (b), provided that:

"Whoever, in committing, or in attempting to commit, any offense defined in section (a) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not less than $10,000.00, or imprisoned not less than five (5) years nor more than twenty-five (25) years, or both."

12 U.S.C., 588c, provided that:

"Whoever, in committing any offense defined in Sec. 588b of this title, or in avoiding or attempting to avoid apprehension for such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be punished by imprisonment for not less than ten (10) years, or by death if the verdict of the jury shall so direct."

(2) That petitioner was sentenced under Count One (588b-a) for twenty (20) years and fined one dollar; that under Count Two (588b-b) he was sentenced for twenty-five (25) years and fined one dollar; that under Count Three (588c) he was sentenced for ninety-nine (99) years and fined one dollar. These sentences were to run concurrently. That petitioner did not appeal. He served his sentence under Count One and paid the fine.

(3) That on the 21st day of December, 1949, petitioner, proceeded by motion in the original case to set aside the sentences imposed under Counts Two and Three. The motion alleged: (1) That the indictment, although in three counts, constituted only a single, sentenceable offense; and (2) that petitioner having fully expiated an alternative, lawful sentence pronounced under Count One, under authority of the Fifth Amendment, should be released. The District Court on February 3rd, 1950, sustained the motion respecting Count Two, but denied the motion as to the sentence imposed under Count Three. Ward appealed from this final order to the United States Court of Appeals, Tenth Circuit and thereafter on June 21, 1950, that Court affirmed the holding of the court below. This case was styled in the Circuit Court, George Ward, Appellant vs. United States of America, No. 4056. A true copy of the opinion affirming the lower court, filed June 21st, 1950, is hereto attached, marked petitioner's Exhibit "A" and made a part hereof.

II

The jurisdiction of the Supreme Court of the United States is invoked under Title 28, Sec. 1254 U.S.C., Rule 37 (b) Federal Rules of Criminal Procedure, and Rule 38, Para. 5 (b) of this Court. This petition for writ of certiorari is being submitted and filed with the Clerk of this Court within the time prescribed by the rules of this Court. The opinion complained of was rendered by the United States Court of Appeals on June 21, 1950. On July 10, 1950, Honorable Robert H. Jackson, Associate Justice of this Court granted an order extending time to file this petition to and including August 19, 1950.

III

(1) There is involved in this cause the question of the construction of Title 12, Sec. 588b and 588c, U.S.C., in that it is alleged that Ward was prosecuted and received three separate sentences for the commission of one offense; and that he was three times punished for the same offense. Petitioner further states that the final decision of the United States Court of Appeals, Tenth Circuit, violates the rights, privileges and immunities of your petitioner under the Constitution of the United States, set up and claimed in said Court, and is erroneous in that said petitioner is being punished more than once for the same offense.

(2) Your petitioner further avers that the Eighth and Tenth Circuit Courts of Appeal are in conflict on the construction of this statute (588c), the Eighth Circuit agreeing with our contention while the Tenth Circuit disagrees. In *Hewitt* vs. *United States*, 110 Fed. 2d 1, Judge Sanborn speaking for the Eighth Circuit, states our position on Sec. 588c. At page 11 of the opinion that Court held:

> "Congress, in enacting Sections 588b and 588c, was dealing with the crime of bank robbery and not with the crimes of forcible taking, putting in fear, assault, putting lives in jeopardy, killing or kidnapping as distinct crimes. In effect, Congress created three classes of bank robbery according to degree; first, that which was accompanied by force or putting in fear; second, that which was accompanied by assault or putting lives in jeopardy; third, that which was accompanied by killing or kidnapping. Proof of robbery of the second class would also prove robbery of the first class, and proof of robbery of the third class would prove robbery of both the first and second classes."

"Our conclusion is that the robbery of the University Bank constituted, for the purpose of sentence, but one offense, etc."

(3) The United States Court of Appeals, Tenth Circuit, in the instant case has held that Sec. 588c creates separate and distinct sentenceable offenses other than those denounced in Sec. 588b, and petitioner states that this holding is in direct conflict with the *Hewitt* Case.

(4) Petitioner further states that there are numerous prisoners serving concurrent sentences in the various Federal prisons under this Bank Robbery Act, each having been sentenced under more than one count or as petitioner claims having been given more than one sentence for the same offense; that such persons believe that they are unjustly confined and feel that their conclusion is justified by the decisions of some of the Circuit Courts of Appeal; that proper and final construction of Sec. 588c should be pronounced by this Court as a matter of public policy. Under separate cover, accompanying this application, your petitioner presents his brief showing more fully his views upon the question involved; also as a part of this petition, and attached hereto, is a full and complete transcript of the record of this case duly certified.

WHEREFORE, your petitioner respectfully prays that the writ of certiorari be issued out of and under the seal of this Court, directed to the United States Court of Appeals for the Tenth Circuit, commanding said Court to certify and send to this Court on a day certain, to be therein designated a full and complete transcript of the records and all proceedings had in this case which is entitled: "In the United States Circuit Court of Appeals, Tenth Circuit, No. 4056, George Ward, Appellant vs. The United States, Appellee," to the end that said cause may be reviewed and

determined by this Court as provided by law; and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate, and that said judgment of the Circuit Court be reversed by this Honorable Court.

EARL BOYD PIERCE,
Attorney for George Ward,
Petitioner.

EXHIBIT "A"

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 4056—May Term, 1950

GEORGE WARD, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*

Appeal from the United States District Court for the Eastern District of Oklahoma

Earl Boyd Pierce and Arthur L. Brook filed a brief for appellant.

Cleon A. Summers, U. S. Atty., and Paul Gotcher, Asst. U. S. Atty., filed a brief for the United States.

Before PHILLIPS, Chief Judge, and HUXMAN and MURRAH, Circuit Judges

PHILLIPS, Chief Judge.

Ward was tried and convicted upon an indictment containing three counts charging violations of 12 U.S.C.A. Sec. 588b and 588c, returned in the United States District Court for the Eastern District of Oklahoma. Count One charged that Ward and another, by force and violence, by putting in fear, by the use of dangerous weapons, to wit, loaded revolvers, by threats, and by brandishing and pointing such loaded revolvers at Carl Andrews, president, and Jessie Collette, bookkeeper, of the First National Bank of Stratford, Oklahoma, on the premises occupied by such bank, feloniously took from Andrews and Collette, $1,307.00 in money of such bank.

The second count charged substantially the same facts as Count One and further alleged that by the use of such revolvers, Ward and his codefendant put in jeopardy the lives of Andrews and Collette by the use of such dangerous weapons.

The third count charged substantially the same facts as Count Two and further alleged that Ward and his co-defendant "to avoid apprehension for the commission of such offense," by physical force compelled and forced Collette, without her consent, to accompany them from the premises of such bank to an automobile awaiting outside such bank and forced her to accompany them in such automobile, without her consent, to a point in the town of Stratford.

Ward was sentenced to imprisonment for a term of 20 years on Count One, 25 years on Count Two, and 99 years on Count Three, and to pay a fine of $1.00 on each count, all of such sentences to run concurrently.

After having served the term of the sentence on Count One, less statutory time for good behavior, Ward filed a motion under 28 U.W.C.A. Sec. 2255, to vacate the sentence imposed on Counts Two and Three. The trial court vacated the sentence imposed on Count Two, but denied the motion to vacate the sentence imposed on Count Three. Ward has appealed.

In *Holbrook* v. *Hunter*, 10 Cir., 149 F. 2d 230, we held that Sec. 588b (a) creates four separate offenses and that Sec. 588b (b) does not create a separate and distinct offense, but merely provides for an increased punishment if, in committing or attempting to commit any offense defined in subsection (a), the offender "assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device."

Sections 588b (a) and 588b (b) have been so construed in the Fifth, Sixth, Eighth, and Ninth Circuits.[1]

---

[1] *Durrett* v. *United States*, 5 Cir., 107 F. 2d 438, 439; *Wells* v. *United States*, 5 Cir. 124 F. 2d 334; *Lockhart* v. *United States*, 6 Cir., 136 F. 2d 122, 124; *McDonald* v. *Moinet*, 6 Cir., 139 F. 2d 939, 941; *Coy* v. *United States*, 6 Cir., 156 F. 2d 293, 294; *Hewitt* v. *United States*, 8 Cir., 110 F. 2d 1, 10-11; *Dimenza* v. *Johnston*, 9 Cir., 130 F. 2d 465, 466; *Wilson* v. *United States*, 9 Cir., 145 F. 2d 734; *Barksdoll* v. *United States*, 9 Cir., 147 F. 2d 617. See, also, *Holiday* v. *Johnston*, 313 U. S. 342, 349.

Sections 3 of the Act of May 18, 1934, 48 Stat. 783 (12 U.S.C.A. Sec. 588c), reads as follows:

> "Whoever, in committing any offense defined in this Act, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be punished by imprisonment for not less than 10 years, or by death if the verdict of the jury shall so direct."

In *Casebeer* v. *United States*, 10 Cir., 87 F. 2d 688, we held that each of the offenses defined in Sec. 588c includes an element not included in the offenses defined in Sec. 588b, and that the offenses defined in the former are separate and distinct from the offenses defined in the latter. Again, in *Gilmore* v. *United States*, 10 Cir., 124 F. 2d 537, we held that Sec. 588c defines offenses separate and distinct from the offenses defined in Sec. 588b.

In the statute as originally enacted, Sec. 588b (a) and 588b (b) were embraced in Sec. 2 and Sec. 588c was embraced in Sec. 3. It will be observed that Sec. 3 embraces as elements of the offenses defined therein, criminal acts which are in addition to and are separate and distinct from the elements of the offenses defined in Sec. 2 and which may occur after an offense defined in Sec. 2 has been fully consummated, even after arrest or confinement for such offense. This, we think, manifests an intent on the part of Congress by Sec. 3 to define offenses separate and distinct from those defined in Sec. 2, and we adhere to the views expressed in the *Casebeer* and *Gilmore* Cases.

However, the third count of the indictment charged facts constituting a violation of Sec. 3. Ward was convicted and sentenced on that count for imprisonment for a term of 99 years. The conviction and sentence on Count Three are valid. And assuming, but not deciding, that Ward should not have been sentenced for the lesser term on Count One to run concurrently with the sentence imposed on Count Three, he was not prejudiced by such lesser

concurrent sentence. Such was the express holding in *Barkdoll* v. *United States*, 9 Cir., 147 F. 3d 617.[2]

It is well settled that where a valid sentence is imposed upon a valid count of an indictment, the defendant is not prejudiced by a sentence imposed upon an invalid count which does not exceed the sentence imposed on the valid count and runs concurrently therewith.[3]

The judgment is AFFIRMED.

---

[2] See, also, *Hewitt* v. *United States*, 8 Cir., 110 F. 2d 1, 11; *Wilson* v. *United States*, 9 Cir., 145 F. 2d 734, 736; *Holiday* v. *United States*, 8 Cir., 130 F. 2d 988, 990.

[3] *Long* v. *United States*, 10 Cir., 139 F. 2d 652, 654; *Edwards* v. *United States*, 10 Cir., 113 F. 2d 286, 289, and cases there cited; *Hirabayashi* v. *United States*, 320 U. S. 81, 85; *Whitfield* v. *Ohio*, 297 U. S. 431, 438; *Claassen* v. *United States*, 142 U. S. 140, 146.

FILE COPY

FILED
AUG 18 1950
CHARLES ELMORE CROPLEY
CLERK

No. 255

In the

Supreme Court of the United States

GEORGE WARD, *Petitioner,*

VERSUS

UNITED STATES OF AMERICA, *Respondent.*

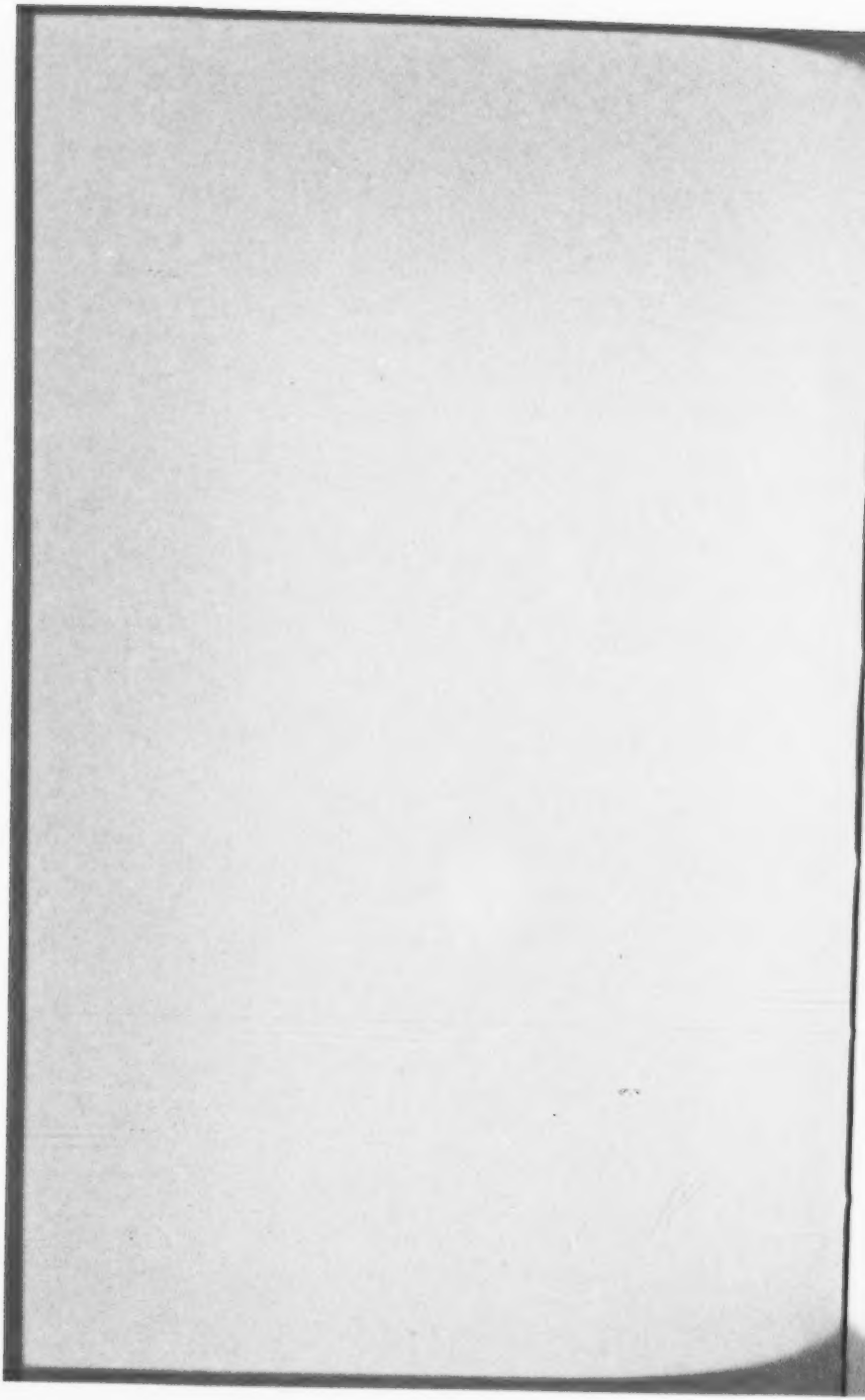
BRIEF OF PETITIONER.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

EARL BOYD PIERCE,
Muskogee, Oklahoma,
Attorney for George Ward, Petitioner.

Of Counsel,
Arthur L. Brook
Ray M. Pierce
Muskogee, Oklahoma

THE STAR PRINTERY, INC., MUSKOGEE 10797



COPY BOUND CLOSE IN CENTER

SUBJECT INDEX.

PAGE

Jurisdiction 1
Statement of the Case 1
Opinion of Court Below 2
Question Presented 2
The Statute 3
The Facts 3
Errors 4

Argument:

First Proposition: The pertinent parts of the above statute establish only one sentenceable offense 5

Second Proposition: Petitioner's present confinement is unauthorized by law 13
Conclusion 14
Certificate of Service 15

TABLE OF CASES.

Blockburger v. *United States*, 234 U. S. 299, 304, 52 S. Ct. 180, 182 ..... 8, 10 11
Casebeer v. *U. S.*, 87 Fed. (2d) 668 ..... 6, 9, 10
Durrett v. *United States*, 107 Fed. (2d) 438 8
Ex Parte Lange, 18 Wall. 176, 21 L. ed. 872 ..... 7, 14
Gavieres v. *U. S.*, 220 U. S. 338 11
Gilmore v. *U. S.*, 124 Fed. (2d) 527 ..... 9, 10, 11
Hewitt v. *United States*, 110 Fed. (2d) 1 ..... 7, 8, 9, 10, 11
Holbrook v. *Hunter, Warden*, 149 F. (2d) 230 ..... 2, 13
In re Bradley, 318 U. S. 50 14
U. S. v. *Harris*, 26 Fed. Sup. 788 10
United States v. *Wiltberger*, 5 Wheat. 576 11
Wells v. *U. S.*, 124 F. (2d) 334 ..... 9, 10

STATUTES.

48 Stat. 783, 50 Stat. 759 (formerly Title 12 USC, Sec. 588b, now Title 18 USC, Sec. 2113 Revised) 3, 9
Id., Title 12, Sec. 588c, USC 3, 4, 11

BOUND CLOSE IN CENTER

IN THE SUPREME COURT OF THE UNITED STATES

No. . . . . .

GEORGE WARD, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

BRIEF OF PETITIONER

In Support of Petition for Writ of Certiorari to the United States Court of Appeals, Tenth Circuit.

Jurisdiction.

Jurisdiction of this Court is invoked under Title 28, Sec. 1254 USC, Rule 37 (b) Federal Rules of Criminal Procedure, and Rule 38, Para. 5 (b) of this Court. The final judgment herein complained of was entered by the United States Court of Appeals, Tenth Circuit, June 21, 1950 (R. 28). On July 10, 1950, an Order of Associate Justice ROBERT H. JACKSON, extending the time to file petition for Certiorari to August 19, 1950, was entered in the office of the Clerk of this Court. On the ——— day of ———, 1950, Petition for Writ of Certiorari and Certified Transcript of the Record was filed in the office of the Clerk of this Court.

Statement of the Case.

On December 21, 1949, petitioner, George Ward, in Case No. 20424, Criminal, United States Court for the Eastern District of Oklahoma, filed a motion to set aside certain sentences imposed on February 4, 1937, under

Counts Two and Three of an indictment for bank robbery (R. 10-13 inc.).

The motion alleged: (*1*) That the indictment, although in three counts, constituted only a single, sentenceable offense; and (*2*) that petitioner having expiated an alternative, lawful sentence pronounced under Count One, under authority of the Fifth Amendment, should be released.

The government filed a response to the motion admitting the sentence on Count Two was void, because "under the holding of the Court in the case of *Holbrook* v. *Hunter, Warden*, 149 F. (2d) 230, the Court exhausted its power to sentence upon the pronouncing of the sentence of twenty years on Count One," but asserted that the sentence under Count Three (99 years, Kidnapping) was valid (R. 14-16 inc.). On February 3, 1950, the District Court sustained the motion respecting Count Two, but denied the motion on Count Three (R. 17).

Opinion of Court Below.

This case was appealed to the United States Court of Appeals, Tenth Circuit, where on June 21, 1950, an opinion (not yet officially reported) was rendered affirming the order of the District Court (R. 23-27) and on the same date said Appellate Court rendered judgment accordingly (R. 28).

Question Presented.

The case is here on petition for Writ of Certiorari and the ultimate question for determination is whether under the facts of the case it was proper for the United States Court of Appeals for the Tenth Circuit to hold that Section 588c, Title 12, USC created an entirely separate and distinct, sentenceable offense, independent of the offenses denounced in Section 588b (a) and (b).

The Statute.

In 1936, the pertinent parts of the bank robbery act, (48 Stat. 783, 50 Stat. 759, then Title 12, USC, Sec. 588b, now Title 18, USC, Sec. 2113 Revised) read as follows:

Section 2 (a):

"Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money, or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank shall be fined not more than $5000.00, or imprisoned not more than twenty years, or both."

Section 2 (b) provided that:

"Whoever, in committing, or in attempting to commit, any offense defined in subsection (a) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not less than $1,000 nor more than $10,000, or imprisoned not less than five years nor more than twenty-five years, or both."

Section 3, (12 USC Sec. 588c) provided that:

"Whoever, in committing any offense defined in Sec. 588b of this title, or in avoiding or attempting to avoid apprehension for such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be punished by imprisonment for not less than 10 years, or by death if the verdict of the jury shall so direct."

The Facts.

Petitioner and another were prosecuted by indictment under the above sections for robbing a national bank in Stratford, Oklahoma. Count One charged that by using force and violence, and putting in fear certain named per-

sons, Petitioner and his associate took and carried away a certain sum of money belonging to the bank. Count Two charged in the same manner that they robbed the same bank and further alleged that in the commission of the robbery the lives of said persons were put in jeopardy. Count Three charged the robbery of the bank in the same manner as charged in Counts One and Two, and further charged that, in order to avoid apprehension for the commission of such offense, petitioner and his associate forced one of said persons to accompany them from the premises of the bank to some point in the town of Stratford (R. 1-7, inc.). Petitioner was convicted by a jury upon all three counts, and was sentenced upon each count, all to run concurrently, as follows:

Count One: 20 years, and a fine of $1.00.

Count Two: 25 years, and a fine of $1.00.

Count Three: 99 years, and a fine of $1.00 (R. 8-9).

Petitioner has paid the fine on Count One and with statutory and industrial good time allowance considered has fully completed and expiated the sentence imposed thereunder. He is now imprisoned in the United States Penitentiary at Leavenworth, Kansas, under the sole authority of the sentence imposed under Count Three.

Errors.

The United States Court of Appeals for the Tenth Circuit erred in holding that Title 12, Sec. 588c, USC authorized a separate, sentenceable offense under the facts of the instant case.

The Court below erred in refusing to reverse the order of the District Court denying petitioner's motion to vacate the judgment and sentence pronounced on Count Three.

ARGUMENT.

The argument will be presented under two propositions:

(1) The pertinent parts of the above quoted statute establish only one sentenceable offense.

(2) Petitioner's present confinement is unauthorized by law.

FIRST PROPOSITION.

The pertinent parts of the above statute establish only one sentenceable offense.

Petitioner contends that the Federal crime of bank robbery, accompanied by kidnaping (588c) is the commission of bank robbery in the superlative degree; that the steps leading up to the culmination of this degree are integral parts of the prohibited offense; and that the statute in question should be construed as declaring:

(a) Robbery by force and putting in fear, is, if nothing more is done, robbery in the first degree;

(b) Robbery by force and assault and putting lives in jeopardy, if nothing more is done, is robbery in the second degree; and

(c) Robbery by force, by assault, and putting lives in jeopardy, accompanied by killing or kidnapping, is robbery in the third or superlative degree. That Congress by enacting 588b and 588c, intended to establish the crime of bank robbery as a felony, punishable by alternative, escalated, penalties, when accompanied by force or putting in fear, by assault or putting lives in jeopardy, or by killing or kidnapping; it being necessary only that the taking of the money or property be accomplished by either one of the three designated means; and that if all three means were employed simultaneously in the robbery of a bank, three separate and distinct, sentenceable offenses would not be committed.

It is therefore urged that whoever robs a bank by force, or putting in fear, is guilty of bank robbery; that whoever robs a bank by force and assault, and putting lives in jeopardy is guilty of bank robbery, the method used being classified by Congress as a more aggravated offense; and that whoever robs a bank either by force and putting in fear, by assault, or by putting lives in jeopardy, and the robbery is accompanied by either killing or kidnapping, or both, is guilty of bank robbery in its most aggravated form, for which the supreme penalty may be assessed.

To us it seems to be doing violence to the ordinary meaning of words and the natural instincts of justice, to insist that Congress meant that if a person robs a bank and the act is accompanied by killing or kidnapping, that such person is not only guilty of robbery in the superlative degree, but that he is also guilty of a series of other offenses; namely, robbery by force and putting in fear, and robbery by assault and putting lives in jeopardy, and then sentence him for each separate offense.

A conclusive test of whether this act creates a multitude of separate and distinct, sentenceable crimes, arising from the same transaction, or only one such crime, may be found by answering the inquiry of whether an indictment in one count, charging all of the elements set out in all of these subsections, would be good, as was held by the United States Court of Appeals, Tenth Circuit, in *Casebeer* v. *U. S.*, 87 Fed. (2d) 668.

It is entirely beside the point, of course, that Congress may punish separately each step leading to the consumation of any criminal transaction which it has the power to prohibit, and also punish the completed transaction. When we consider the mathematical principle that the greater includes the less, and the legal principle of

statutory construction that the intent of Congress shall govern, and that this intent is determined by looking to the context and language of the statute; and that the framers of the act were well versed in the doctrine of merger, and were aware of the rule announced by this Court in *Ex Parte Lange* (double jeopardy), 18 Wallace, 176, 21 Law ed., 872, we are impelled to conclude that the Congress intended that there should be assessed but one penalty for one completed crime.

Now, if the government in this case had felt that the facts were not strong enough to convict for the offense of robbery, accompanied by kidnapping, it could have elected to stand on the act of robbery by assault and putting lives in jeopardy; if the government believed that the facts were too weak to convict for robbery by assault and putting lives in jeopardy, it could have elected to prosecute for robbery by force or putting in fear. The prosecutor had the sole right to elect the alternative upon which to try petitioner. The Trial Court had lawful power to assess punishment only for the alternative elected.

In the case of *Hewitt* v. *United States*, 110 Fed. (2d) 1, Judge SANBORN, speaking for the Eighth Circuit, very clearly states our position on this statute. He stated in that decision at page 11 that:

> "Congress, in enacting Sections 588b and 588c, was dealing with the crime of bank robbery and not with the crimes of forcible taking, putting in fear, assault, putting lives in jeopardy, killing or kidnapping as distinct crimes. In effect, Congress created *three classes of bank robbery* according to degree; first, that which was accompanied by force or putting in fear; second, that which was accompanied by assault or putting lives in jeopardy; third, that which was accompanied by killing or kidnapping. *Proof of robbery of the second class would also prove robbery*

of the first class, and proof of robbery of the third class would prove robbery of both the first and second classes."

"Our conclusion is that the robbery of the University Bank constituted, for the purpose of sentence, but one offense, etc." (Italics ours.)

There Hewitt was charged with bank robbery under two counts grounded on 588b (a) and (b) and on appeal contended that the Court erred in imposing a sentence under each count. Judge SANBORN agreed with this contention and quoted Justice SUTHERLAND in *Blockburger* v. *United States*, 234 U. S. 299, 304, 52 S. Ct. 180, 182, where this Court held:

"The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not."

Prior to *Hewitt*, the United States Court of Appeals, for the Fifth Circuit, in the *Durrett* v. *United States*, 107 Fed. (2d) 438, had arrived at the same conclusion on 588b (a) (b).

In *Durrett's* case Count One charged the defendant with entering the bank with intent to commit larceny therein. This count was held to be a separate, sentenceable offense. In the instant case petitioner was not charged with entering the bank with intent to commit larceny.

Again, in the *Hewitt* case, *supra* (8th Circuit) Judge SANBORN said at page 11:

"The Circuit Court of Appeals of the 10th Circuit, by implication, in *Casebeer* v. *U. S.*, 87 Fed. (2d), 688, apparently arrives at the same conclusion as was later reached [*in the Durrett case*] by the 5th Circuit." (Italics ours.)

In *Casebeer's* case, *supra*, the Tenth Circuit apparently took the same view on this question then as was taken by Judge SANBORN in the *Hewitt* case, namely, that the various steps leading up to the completed offense were in the nature of attempts, and that acts which alone would be attempts, and if made criminal by federal statute would themselves be crimes, would, if the offense be completed, be merged into the completed act.

If, therefore, each fragmentary part of a completed offense constitutes a separate, sentenceable offense as the opinion below affirms, plainly then to charge each of these parts of a single transaction in a single count would likewise make the pleading duplicitous, which is precisely the result avoided in *Casebeer* by the same Court.

The opinion below not only reaffirms the holding in *Casebeer* but also expressly adheres to the lower Court's decision in *Gilmore* v. *U. S.*, 124 Fed. (2d) 527 (R. 25). Before discussing the *Gilmore* decision something should be said concerning the case of *Wells* v. *U. S.*, (5th Circuit), 124 F. (2d) 334, because of its reference in *Gilmore* wherein without qualification it is said that Section 588b (a) and (b) creates four separate and distinct offenses.

In *Wells* the *fourth count* charged the defendant *entered the bank with intent to rob.* This was held to be a separate offense because it was necessary to allege and prove that the defendant entered the bank with intent to rob. Here, it was not essential to prove that Wells used force or a dangerous weapon, in order to convict for the offense of "entering with intent to rob."

This Court will observe that in *Wells'* case, in Count Four, "entering the bank with intent" was the specific offense charged; and that this offense was unattended by aggravating circumstances; that Count One charged rob-

bery of the bank by force and violence and putting in fear, while Counts Two and Three charged that this same offense was committed in aggravated form. Counts One, Two and Three were held to be one sentenceable offense because as held in *Blockburger, supra*, EACH of said counts (one, two and three) did not require proof of a fact which the other did not.

Again in *Hewitt's* case, *supra*, page 10, Judge SANBORN in noticing and criticizing the double offense theory of 588b (a), (b), said of *U. S.* v. *Harris*, 26 Fed., Sup. 788:

> "This seems to overlook the fact that the same proof which will establish the second will prove the first."

Since, however, Counts One, Two and Three, in *Wells'* constituted but one sentenceable offense, we are unable to see how the case was helpful to the conclusion reached in *Gilmore*.

Gilmore's decision also refers to *Casebeer, supra*, which held that the including of all the different degrees of bank robbery in an indictment containing a single count did not make it duplicitous because all of these elements were required to make up the complete offense of robbery under Sec. 588c. Therefore we must conclude, that for the purpose of sentence, when the whole transaction is completed, all these different elements constitute but a single, federal offense; that is, robbery of a bank accompanied by kidnapping or killing.

Now in the *Gilmore* case, 124 Fed. (2d) 527 the Court below at page 540, said:

> "It thus is manifest that the indictment in this case charged an element and necessitated proof of a fact not charged or necessary to be proved in the former case."

Yet it is plain that proof of the facts alleged in that case under 588c, would prove all of the facts alleged in both counts of the first indictment. We believe this point was overlooked in *Gilmore*, because at page 539, the statement of the rule in *Blockburger*, *supra*, is quoted without regard to its qualification. For we understand the rule to be as stated in *Blockburger* and followed by *Hewitt* "that where the same act or transaction constitutes a violation of two distinct statutory provisions the test to be applied to determine whether there are two offenses or only one is whether *each* provision requires proof of an additional fact which the *other* does not." (Italics ours.)

This Court will note that Judge SANBORN in *Hewitt* emphasized the word "EACH". Therefore, we say, that when the greatest count in an indictment drawn under the bank robbery statute employs elements alleged in the other counts, and the proof required to prove the greatest count also proves the lesser counts, that all the counts create only one sentenceable offense. This distinction, it appears to us, was overlooked in the *Gilmore* case. Further, the facts in *Gilmore* were not one transaction, as in the instant case. There the offense of robbery by force and violence and by putting in fear, and putting lives in jeopardy, was completed, and the offender was captured, tried, and convicted before the commission of the alleged offense prosecuted under 588c and upon which the decision rests. We think this distinction is sufficient to make it inapplicable to the case at bar. *Blockburger* v. *U. S. supra*, at page 182; *Graviers* v. *U. S.*, 220 U. S. 338.

Further, our views expressed herein are in harmony with the words of the venerable MARSHALL, C. J., in *United States* v. *Wiltberger*, 5 Wheaton, 576, that

> "penal laws should be construed strictly and the intention of Congress should govern in their construction.

> If a case be within the intention, it must be considered within the letter of the statute, provided it is within the reach of federal power. The rule that penal laws should be construed strictly, is perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is fixed in the legislative, not in the judicial department. It is the legislature, not the court, which is to define crime, and ordain its punishment. It would be dangerous, indeed, to carry the principle that a case which may be within the reason or mischief of a statute, is within its provisions, so far as to punish an act outside of the limits of federal power, because it is of equal atrocity, or is connected with those that are within such limits. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents to form a general rule for other cases."

It will be remembered that the statute in question was not aimed at intra-state kidnapping; but at kidnapping when used as a means to successfully rob a bank. It is fundamental that where a statute is susceptible of more than one construction that construction should be placed upon it that will render it constitutional.

To hold, therefore, that Congress intended to proscribe intra-state kidnapping as a separate offense and not as an aggravated, integral element of bank robbery would be placing upon this statute a construction which would render it invalid. But to hold that kidnapping, in order to effectuate escape, is an integral part of bank robbery in the superlative degree, renders the act constitutional and valid.

SECOND PROPOSITION.

Petitioner's present confinement is unauthorized by law.

Feeling that we have shown that petitioner is guilty of only one sentenceable offense we will endeavor to show that since he has served the one sentence lawfully imposed upon him he is now entitled to be released.

We believe that the case of *Holbrook* v. *Hunter, Warden*, 10 Cir. 149 F. (2d) 230, is decisive in the matter respecting the exhaustion of the power of the court to sentence a prisoner after a lawful, alternative sentence has been imposed. We herewith set forth the pertinent part of the holding in this recent opinion, as follows (at pages 230 and 232):

> "An indictment containing two counts was returned against petitioner, Holbrook, and another in the District Court of the United States for the Western District of Missouri, Southern Division. Each count charged a violation of 12 USCA Sec. 588b. * * * It will be observed that Count One charged that petitioner and his codefendant in committing the offense defined in subsection (a) pointed shotguns and revolvers at the officers, agents and employees of the bank and brandished such weapons before them in a menacing manner. Therefore, count one charged that petitioner and his codefendant in committing the offense defined in subsection (a) by the use of a dangerous weapon, assaulted such persons. It follows that, on petitioner's plea of guilty to Count One, he was lawfully sentenced under the provisions of subsection (b). *Therefore, the most that can be said is that when the court imposed the sentence of 20 years on count one, it exhausted its power to sentence, and the sentence on Count Two was void.*" (Italics ours).

Ward was sentenced on three counts, to run concurrently. When he served his time and paid his fine under

the sentence under Count One he was entitled to be released. No man shall be twice punished for the same offense. *Ex Parte Lange*, 18 Wallace, 176, 21 Law ed. 872; *In re Bradley*, 318 U. S. 50. When the petitioner in the instant case was before the court for sentence, after the verdict, it was in the discretion of the court to elect upon which count it would sentence the prisoner. There existed three alternative penalties. The petitioner has now fully expiated the sentence imposed under Count One. Under the authority of the above decisions, *In re Bradley, supra*, and *Ex Parte Lange, supra*, the court exhausted its power upon the pronouncement of sentence on Count One and its power to elect is at an end.

CONCLUSION.

It is submitted that it was improper for the United States Court of Appeals for the Tenth Circuit to hold that Section 588c, Title 12, USC, when applied to the instant case, created an entirely separate and distinct, sentenceable offense, independent of the offenses denounced in Section 588b (a) and (b); that the pertinent parts of the bank robbery statute establish only one sentenceable offense; that petitioner's present confinement is unlawful, in that he has fully expiated one of the lawful, alternative penalties prescribed for bank robbery; that because of the conflict in the decisions of the United States Courts of Appeal for the Fifth, Eighth, and Tenth Circuits in interpreting and applying Sec. 588c, the Writ of Certiorari should be issued, directed to the Court below, commanding said Court to send to this Court a certified transcript of the record of the case below, to the end that said cause may be reviewed and determined as provided by law; and that the final order of the lower court be reversed, with directions to void the purported sentence pronounced under

Count Three of the indictment herein and to discharge the petitioner.

Respectfully submitted,

EARL BOYD PIERCE,
Attorney for George Ward,
Petitioner.

CERTIFICATE OF SERVICE.

I hereby certify that on the 15th day of August, 1950, I mailed, postage fully prepaid, two (2) copies of the foregoing brief to the Solicitor General, Washington, D. C.

EARL BOYD PIERCE.

MEMORANDUM

CITATIONS

Cases:

	Page
Hewitt v. *United States*, 110 F. 2d 1, certiorari denied, 310 U. S. 641	3
Holbrook v. *Hunter*, 149 F. 2d 230	4
Pinkerton v. *United States*, 328 U. S. 640	4

Statutes:

Bank Robbery Act of May 18, 1934, c. 304, 48 Stat. 783, 12 U.S.C. 588b and 588c	2, 4

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 255

GEORGE WARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted in February 1937 in the District Court for the Eastern District of Oklahoma (R. 7, 10) on a three count indictment which charged that he and one Odus Van Buskirk, by force and violence, by putting in fear, and by the use of loaded revolvers, feloniously took $1,307 belonging to the First National Bank of Stratford, Oklahoma, a member bank of the Federal Reserve System (count 1); that in committing the offense

described in count one and by use of the loaded revolvers, they put in jeopardy the lives of two named officers of the bank (count 2); and that in committing such offense, and to avoid apprehension, they forced one of the officers to accompany them without her consent in their flight from the bank (count 3) (R. 1-6). Petitioner was sentenced to concurrent terms of imprisonment of 20, 25, and 99 years, respectively, and to pay a fine of $1 on each count (R. 7).[1]

The present proceeding arose upon a motion filed by petitioner under 28 U. S. C. [1948 rev.] 2255 to vacate the sentences on counts 2 and 3 (R. 8-11). He alleged that he has completed his sentence on count 1, that his continued imprisonment is illegal

---

[1] The federal Bank Robbery Act of May 18, 1934, c. 304, 48 Stat. 783, 12 U.S.C. 588b and 588c, provided as of that time as follows:

"Sec. 2. (a) Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

"(b) Whoever, in committing, or in attempting to commit, any offense defined in subsection (a) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not less than $1,000 nor more than $10,000 or imprisoned not less than five years nor more than twenty-five years, or both.

"Sec. 3. Whoever, in committing any offense defined in this Act, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be punished by imprisonment for not less than 10 years, or by death if the verdict of the jury shall so direct."

in that the indictment charged only one offense, and that since he has satisfied the sentence and fine under count one, he "has fully complied with one of the alternative penalties prescribed by law for bank robbery" (R. 10-11). In response to the motion, the United States Attorney conceded that the sentence on count 2 was void (R. 13), but contended that the sentence on count 3 was valid since that count charged an offense separate and distinct from the one charged in counts 1 and 2 (R. 13-14). The District Court thereupon entered an order vacating the sentence on count 2, but dismissed the motion as to count 3 (R. 14-15). On appeal, the Court of Appeals affirmed the District Court's order (R. 18-21; 183 F. 2d 270).

Petitioner's sole contention is that the three counts of the indictment alleged a single offense and that the concurrent sentences constituted double jeopardy (Pet. 4-5; Br. 5-14).

It has been held, as petitioner points out, that Sections 2(b) and 3 of the Bank Robbery statute merely define aggravated degrees of the crime of robbery defined in Section 2(a). *Hewitt* v. *United States*, 110 F. 2d 1, 11 (C. A. 8), certiorari denied, 310 U. S. 641. But whether Section 3, in circumstances such as we have here where the kidnapping was committed in the course of the robbery, is properly construed in this manner or as defining an offense distinct from the robbery, as the court below thought (R. 20), is of no consequence in the

present case. For the third count charged the offense as defined in Section 3, and the imprisonment sentence imposed on that count was within the maximum authorized by that section. Thus, as the court below observed (*ibid.*), "The conviction and sentence on count three are valid. And assuming, but not deciding, that Ward should not have been sentenced for a lesser term on count one to run concurrently with the sentence imposed on count three, he was not prejudiced by such lesser concurrent sentence. * * * It is well settled that where a valid sentence is imposed upon a valid count of an indictment, the defendant is not prejudiced by a sentence imposed upon an invalid count which does not exceed the sentence imposed on the valid count and runs concurrently therewith." See also *Pinkerton* v. *United States,* 328 U. S. 640, 641-642.

Petitioner's reliance (Br. 13-14) on *Holbrook* v. *Hunter*, 149 F. 2d 230 (C. A. 10), is misplaced. There, as here, the Court of Appeals sustained the greater of the two sentences imposed by the trial court. It held in effect that the trial court's power to sentence under Section 2(a) and (b) is exhausted under whichever count it imposes the heavier penalty and not, as petitioner believes, that it is exhausted when it imposes sentence under the first count for the simple degree of the offense. Furthermore, the trial court in that case imposed consecutive sentences and the defendant, unlike petitioner here, was clearly prejudiced by such sentences.

In view of the foregoing, since the instant case presents no conflict of decisions and no question of importance, it is respectfully submitted that the petition for certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
JAMES M. MCINERNEY,
Assistant Attorney General.
ROBERT S. ERDAHL,
FELICIA H. DUBROVSKY,
Attorneys.

OCTOBER, 1950.

☆ U. S. GOVERNMENT PRINTING OFFICE 1950 907633 144